

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DENNIS R. COX</b>	)	
Claimant	)	
V.	)	
	)	
<b>CITY OF PRATT</b>	)	
Respondent	)	Docket No. 1,065,334
AND	)	
	)	
<b>EMC INSURANCE COMPANIES</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the July 21, 2014, Award entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson. The Board heard oral argument on December 9, 2014.

**APPEARANCES**

Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated the Board may consult the *Guides*<sup>1</sup> when making its decision.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the Guides unless otherwise noted. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. E.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sept. 15, 2011) and *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926 (Kan. WCAB May 21, 2008).

**ISSUE**

SALJ Nelson awarded claimant permanent partial disability benefits based upon a 20% right lower extremity functional impairment.

Claimant contends he sustained a 24% whole person functional impairment as the result of bilateral knee and left hip injuries and requests the Board modify the SALJ's Award. Claimant alleges the SALJ erred by finding claimant did not sustain left knee and left hip permanent functional impairments.

Respondent contends claimant's impairment should be limited to a 17% right lower extremity functional impairment.

The sole issue is the nature and extent of claimant's disability.

**FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant, a lineman, was participating in a lineman rodeo on October 7, 2010, with respondent's consent. Respondent paid claimant's wages while he was at the rodeo. Claimant testified he participated in a timed event requiring him to climb a pole, ring a cowbell and then descend. He indicated he wore gaffs, similar to spikes, on his feet to climb the pole. As he was circling the pole and descending, claimant's gaff stuck into the pole and he broke his right tibial plateau.

Claimant testified he had four surgeries on his right lower extremity and one on his left. He indicated he had hardware attached to his right shinbone and two subsequent surgeries on the right knee to remove the hardware and repair torn menisci, all performed by Dr. Jonathan Loewen. Claimant testified a torn meniscus in his left knee caused by extra stress was also repaired by Dr. Loewen. According to claimant, Dr. Paul Pappademos later repaired another torn right knee meniscus.

When asked at the regular hearing how he was getting along with his right knee, claimant indicated he was not getting along and that both knees popped all the time. He testified he cannot straighten his right leg completely or put weight on his right knee. He described his left knee as being abused. Claimant testified, "My hip on my left side is popping left and right. I mean, it's just -- it's cracking, you know, just a lot of movement."<sup>2</sup> He described his left hip pain as three on a scale of one to ten with ten being the most pain. According to claimant, he had no problems with his left hip prior to his work accident.

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<sup>2</sup> R.H. Trans. at 23.

Claimant acknowledged first complaining of hip pain to Dr. Loewen on June 3, 2013, which was the last time claimant saw the doctor. Claimant indicated he received no treatment for hip pain. According to claimant, Dr. Loewen indicated he could not treat the left hip unless workers compensation would take care of it. Claimant also indicated he reported hip pain to Dr. Pappademos, but did not specify when he did so. Dr. Pappademos' records were not placed into evidence.

Claimant testified he initially returned to work for respondent answering phones in a booth at respondent's power plant. He later resumed his normal job duties, but wears a knee brace to climb poles.

At the request of his counsel, claimant was evaluated by Dr. Pedro A. Murati on September 11, 2013. Claimant's chief complaints were swelling and pain in the right knee, the right knee locking up, left knee pain, difficulty squatting and kneeling due to bilateral knee pain, bilateral hip pain and popping, not being able to straighten the right knee and limping due to bilateral hip and knee pain.

Dr. Murati noted claimant was treated by Dr. Loewen from October 8, 2010, through June 3, 2013. Dr. Murati indicated Dr. Loewen provided claimant the following treatment:

- On October 8, 2010, Dr. Loewen performed an open reduction and internal fixation right medial tibial plateau intra-articular fracture with allograft bone grafting.
- On March 3, 2011, Dr. Loewen performed surgery, which included diagnostic arthroscopy of the right knee, arthroscopic partial medial meniscectomy, arthroscopic lysis of adhesions, arthroscopic chondroplasty of the patella, arthroscopic chondroplasty of the medial compartment, removal of hardware from the right knee and allograft bone grafting of the bone defects left by the removal of the hardware.
- On May 5, 2011, Dr. Loewen performed a left knee diagnostic arthroscopy and arthroscopic chondroplasty of the medial femoral condyle and patella.
- On September 29, 2011, Dr. Loewen performed a right knee diagnostic arthroscopy, arthroscopic lysis of adhesions, arthroscopic removal of loose body and arthroscopic chondroplasty.

According to Dr. Murati, on September 28, 2012, Dr. Pappademos performed a right knee arthroscopy, which included chondroplasty of the medial femoral condyle, medial tibial plateau and lateral femoral condyle.

Dr. Murati had claimant complete a document entitled "Omission Form."<sup>3</sup> Question 5 of the form asks whether claimant had ever received any work restrictions for an injury to his body and claimant answered yes. Question 6 then asked, if yes, what body parts were injured and when? Claimant responded by writing his right knee on October 7, 2010, and his left knee as a result of his right knee injury. No other injuries were listed.

According to Dr. Murati, claimant reported his hip pain began in March 2012. Dr. Murati's physical examination of the hips disclosed a positive left Patrick's (passively externally rotating and flexing the hip for pain); tenderness of the trochanteric bursa, bilaterally, worse on the left (determined by palpating the trochanteric bursa); and an antalgic gait with decreased stance phase on the right. The doctor testified claimant's left hip range of motion was significantly worse than the right hip range of motion.

Dr. Murati's physical examination of the knees revealed: (1) a negative McMurray's exam, bilaterally; (2) a positive drawer exam on the right, not present on the left; (3) no medial or lateral instability of the bilateral knees; (4) a negative Lachman's, bilaterally (a test for cruciate laxity); (5) mild crepitus of the left knee, moderate on the right; (6) positive patellar compression exam and medial patellar apprehension exam on the left; (7) positive lateral patellar apprehension exam on the right; (8) an eight-degree flexion contracture of the right knee, otherwise full range of motion; and (9) full range of motion of the left knee.

Dr. Murati opined:

According to the Fourth Edition of The Guides to the Evaluation of Permanent Impairment, for the right trochanteric bursitis, using table 64, the claimant receives 7% right lower extremity impairment. For the right patellofemoral syndrome, using table 62, this claimant receives 5% right lower extremity impairment. For the atrophy of the right thigh, using table 37, this claimant receives 4% right lower extremity impairment. For the flexion contracture of the right knee, using table 41, this claimant receives 10% right lower extremity impairment. For the right cruciate laxity, using table 64, 7% right lower extremity impairment. For the flexion contracture of the right hip, using table 40, this claimant receives 5% right lower extremity impairment. For the right partial medial meniscectomy, using table 64, this claimant receives 2% right lower extremity impairment. These right lower extremity impairments combine for 34% right lower extremity impairment which converts for 14% whole person impairment. For the left trochanteric bursitis, using table 64, the claimant receives 7% left lower extremity impairment. For the left patellofemoral syndrome, using table 62, this claimant receives 5% left lower extremity impairment. For the flexion contracture of the left hip, using table 40, this claimant receives 20% left lower extremity impairment. These left lower extremity impairments combine for 30% left lower extremity impairment which converts for

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<sup>3</sup> Murati Depo., Ex. 3.

12% whole person impairment. These whole person impairments combine for 24% whole person impairment.<sup>4</sup>

When asked to explain his 5% functional impairment for claimant's left patellofemoral syndrome, Dr. Murati testified the footnote to Table 62 of the *Guides* applied. The footnote was quoted by respondent's counsel at Dr. Murati's deposition and states: "In a patient with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on roentgenograms, a 2% whole-person or 5% lower-extremity impairment is given."<sup>5</sup> Dr. Murati indicated only the right knee had direct trauma, but he rated the left knee for overcompensation. The doctor interpreted direct trauma as including microtraumas for purposes of applying the footnote.

At Dr. Murati's deposition, respondent offered into evidence, without objection, Dr. Loewen's notes from claimant's June 3, 2013, appointment. Dr. Murati reviewed Dr. Loewen's June 3, 2013, notes and acknowledged claimant only complained of right hip pain, not left or bilateral hip pain.

At the request of respondent, claimant was evaluated by Dr. Paul S. Stein on March 24, 2014. The doctor reviewed claimant's medical records, obtained a history and performed a physical examination. Dr. Stein noted claimant had pain in both knees, with the right worse than the left. The doctor also indicated claimant had popping and grinding in both knees, greater on the right.

Dr. Stein found claimant sustained a right knee injury in the form of a comminuted tibial plateau fracture and underwent open reduction and internal fixation of the fracture, which healed satisfactorily. The doctor noted it is likely claimant would continue having right knee pain with progressive degenerative arthritis, ultimately requiring a total knee replacement.

With regard to claimant's left knee, Dr. Stein indicated the primary pathology on claimant's May 5, 2011, diagnostic arthroscopy was chondromalacia. The doctor noted the chondromalacia likely preexisted the October 7, 2010, incident, but was aggravated by abnormal gait and became symptomatic because of mechanical aggravation. Dr. Stein testified the physical examination of claimant's left knee was pretty much intact, and he did not find any specific basis upon which to provide a left knee functional impairment from this specific injury.

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<sup>4</sup> Murati Depo., Ex. 2 at 7.

<sup>5</sup> *Guides* at Table 62, p. 3/83.

Dr. Stein noted claimant had current complaints of low back pain. Claimant also had right hip pain in the upper, lateral iliac crest area that started six months earlier. Dr. Stein confirmed claimant had an antalgic gait, but claimant had a normal gait when the doctor saw claimant on March 24, 2014. Dr. Stein also indicated that if claimant had hip or back pain, it should have developed earlier when claimant's abnormal gait was worse. The doctor indicated claimant may have low back and hip discomfort, but not an injury. Dr. Stein testified he did not recall having very many of his patients complain of hip discomfort after using crutches or walking with limited weight bearing. Dr. Stein indicated he tested claimant's range of motion in both hips and they were equal and essentially normal, although the doctor admitted he did not measure the range of motion. The doctor could not, within a reasonable degree of medical probability, document a causal relationship between the low back and hip conditions and claimant's 2010 work accident. Nor could he find an impairment for claimant's lower back and right hip referable to claimant's work injury. The doctor testified he did not observe symptom magnification on the part of claimant.

With regard to claimant's permanent functional impairment, Dr. Stein opined:

Permanent partial impairment of function is assessed under the 4th edition of the AMA Guides to the Evaluation of Permanent Impairment. For the right lower extremity, 5% lower extremity impairment from table 64 on page 85 related to the nondisplaced fracture of the tibial plateau. From the same table, 2% impairment to the lower extremity for partial meniscectomy. Total right lower extremity impairment by this, diagnosis, method would be 7%. The Guides also provide impairment for injury to the knee based upon physical findings. From table 41 on page 78, this would be a 10% impairment to the lower extremities at the level of the knee. Section 3.2i on page 84 indicates that the examiner should generally use one method or the other but not both, except when a joint fracture results in arthritic degeneration, in which case it is appropriate to use both methods and add the results. I believe that is the case here and assess 17% impairment to the right lower extremity at the level of the knee.

For the left knee, no specific functional impairment is assessed as a result of the accident at work on 10/7/10.<sup>6</sup>

The SALJ found claimant sustained a 20% right lower extremity functional impairment, no functional impairment for the left lower extremity and claimant did not prove he sustained a whole body functional impairment. The SALJ stated:

. . . Claimant has failed to sustain his burden of proving that he sustained an injury to his right or left hip, right lower extremity impairment as result of atrophy of his right thigh, trochanteric bursitis or flexion contracture of his right hip, left lower extremity impairment as result of trochanteric bursitis or flexure [*sic*] contracture of

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<sup>6</sup> Stein Depo., Ex. 2 at 7.

his left hip, or [left] lower extremity impairment as result of patellofemoral [sic] syndrome of his left knee; that Dr. Murati, in addition to his beliefs about Claimant's whole body and left knee impairment resulting from medical conditions in his right and left hips and left knee, believes that as result of Claimant's 10/7/11 [sic] accident, Claimant should receive: 10% right lower extremity impairment as result of flexion contracture of the right knee, 7% right lower extremity impairment as result of cruciate laxity of the right knee; 2% right lower extremity impairment for right partial medial meniscectomy, and 5% right lower extremity impairment for patellofemoral syndrome of the right knee; that these right lower extremity impairments combine under the AMA Guides to 23% right lower extremity impairment; that Dr. Stein believes that as result of Claimant's injury on 10/7/10, Claimant should receive: 5% right lower extremity impairment as result of nondisplaced fracture of the tibial plateau of the right knee, 2% right lower extremity impairment for the partial meniscectomy in the right knee, 10% right lower extremity at the level of the knee because the fracture in the tibial plateau resulted in joint degeneration and it is proper to combine both diagnostic and examination approaches; that these right lower extremity impairments combine to 17% impairment to the right lower extremity at the level of the knee; that though Dr[s]. Murati and Stein find different basis for right lower extremity impairment except 2% for partial medial meniscectomy, it is reasonable that the Court average the two opinions and conclude that as result of Claimant's accident of 10/7/11 [sic], he sustained a 20% permanent impairment to his right lower extremity.<sup>7</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>8</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>9</sup>

K.S.A. 2010 Supp. 44-551(i)(1) states, in part:

[T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2010 Supp. 44-555c(a) states, in part:

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<sup>7</sup> SALJ Award at 8-9.

<sup>8</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>9</sup> K.S.A. 2010 Supp. 44-508(g).

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Board review of a judge's order is de novo on the record.<sup>10</sup> The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.<sup>11</sup> The Board, on de novo review, makes its own factual findings.<sup>12</sup>

#### Whole Person Functional Impairment

Claimant asserts he sustained a whole person functional impairment as the result of a work-related left hip injury. Claimant asserts his left hip injury resulted from an antalgic gait he developed due to his work accident. The first time a left hip injury or left hip pain was mentioned in any medical record was in Dr. Murati's report of September 11, 2013, nearly three years after claimant's accident. Claimant indicated he told Dr. Pappademos of having hip pain, but did not testify when he did so. Claimant testified he first reported hip pain on June 3, 2013, to Dr. Loewen. However, Dr. Loewen's notes from that visit indicated claimant made right hip complaints. At oral argument, claimant's counsel argued Dr. Loewen must have mistakenly recorded right hip instead of left hip in the notes. The Board finds no merit or basis in evidence for that assertion. Even if that allegation is correct, the first mention of any hip pain in claimant's medical records was more than two and one-half years after his work accident.

The Board finds the testimony and opinions of Dr. Stein with regard to claimant's hip more credible than Dr. Murati's. Dr. Stein indicated it was unusual for a patient to develop hip pain from an antalgic gait. The doctor did not observe any loss of range of motion in claimant's left hip. The doctor noted claimant may have had hip pain, but no hip injury. He also indicated claimant's alleged hip pain should have developed earlier, when his antalgic gait was more pronounced. Dr. Murati indicated claimant's left hip range of motion was significantly worse than his right. The Board questions that finding, considering the record is devoid of any left hip complaints until claimant saw Dr. Murati.

Claimant's statements concerning the commencement of his hip pain are problematic. On March 24, 2014, Dr. Stein was told by claimant that his hip pain began

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<sup>10</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>11</sup> See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

<sup>12</sup> See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).



six months earlier, which would have been approximately October 2013. According to Dr. Murati, claimant indicated his hip pain began in March 2012. Claimant first reported hip pain to Dr. Loewen in June 2013.

The Board finds claimant failed to prove by a preponderance of the evidence that he sustained a whole person functional impairment.

#### Right Lower Extremity Functional Impairment

The Board affirms the SALJ's finding that claimant sustained a 20% right lower extremity functional impairment. The SALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. The Board adopts the SALJ's findings and conclusions as its own as if specifically set forth herein.

#### Left Lower Extremity Functional Impairment

The Board, giving equal credence to Dr. Stein's opinion that claimant sustained 0% left lower extremity functional impairment and Dr. Murati's 5% left lower extremity functional impairment for the left patellofemoral syndrome, finds claimant sustained a 2.5% left lower extremity functional impairment. Dr. Stein indicated claimant's left knee was pretty much intact and he did not find any specific basis upon which to provide a functional impairment to the left knee. However, claimant reported left knee pain, as well as popping and grinding. While Dr. Murati's interpretation of the footnote to Table 62 of the *Guides* is questionable, the doctor noted claimant complained of left knee pain and had left knee crepitus. The Board also considers significant the fact claimant underwent left knee surgery and his testimony that his left knee remained painful. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>13</sup> The Board has the right and obligation to weigh the evidence in determining claimant's permanent impairment. The Board, as the fact finder, is not bound by the impairment ratings of Drs. Stein and Murati.

#### CONCLUSION

1. Claimant failed to prove he sustained a whole person functional impairment as the result of an alleged left hip injury.
2. Claimant sustained a 20% right lower extremity functional impairment at the level of the knee.
3. Claimant sustained a 2.5% left lower extremity functional impairment at the level of the knee.

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<sup>13</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>14</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the July 21, 2014, Award entered by SALJ Nelson as follows:

#### **Right Leg**

Claimant is granted compensation from respondent and its insurance carrier for an October 7, 2010, accident and resulting disability. Based upon an average weekly wage of \$1,263.34, claimant is entitled to receive 5.95 weeks of temporary total disability benefits at \$545 per week, or \$3,242.63,<sup>15</sup> followed by 38.81 weeks of permanent partial disability benefits at \$545 per week, or \$21,151.45, for a 20% functional impairment to the right leg, making a total award of \$24,394.08, which is all due and owing less any amounts previously paid.

#### **Left Leg**

Claimant is granted compensation from respondent and its insurance carrier for an October 7, 2010, accident and resulting disability. Based upon an average weekly wage of \$1,263.34, claimant is entitled to receive 5.95 weeks of temporary total disability benefits at \$545 per week, or \$3,242.62, followed by 4.85 weeks of permanent partial disability benefits at \$545 per week, or \$2,643.25, for a 2.5% functional impairment to the left leg, making a total award of \$5,885.87, which is all due and owing less any amounts previously paid.

The SALJ approved a contract for attorney fees, but the administrative file contains no contract. K.S.A. 44-536(b) requires an attorney fee contract to be filed with the Director. The SALJ's order approving attorney fees is vacated. Claimant's counsel is instructed to file a contract for attorney fees with the Director and seek approval of the contract from the SALJ.

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<sup>14</sup> K.S.A. 2013 Supp. 44-555c(j).

<sup>15</sup> At the regular hearing, the parties represented different dollar amounts of temporary total disability benefits paid. The SALJ used the amount represented by respondent, \$6,485.25, in the Award and claimant did not appeal that to the Board. There was no indication whether the temporary total disability benefits were applicable to the right or left lower extremity injuries. Accordingly, the temporary total disability benefits will be split and \$3,242.63 will be awarded for the scheduled injury to the right leg and \$3,242.62 will be awarded for the scheduled injury to the left leg.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Melinda G. Young and Matthew L. Bretz, Attorney for Claimant  
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Honorable C. Stanley Nelson, Special Administrative Law Judge